

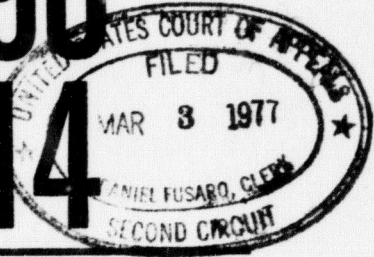
***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

76-7490
76-7514

ORIGINAL



United States Court of Appeals

For the Second Circuit

EUTECTIC CORPORATION, NEW METALS
CORPORATION and METALLIZING
COMPANY OF AMERICA, INC.,

*Plaintiffs-Appellees
and Cross-Appellants,*

v.

METCO, INC.,

*Defendant-Appellant
and Cross-Appellee.*

PLAINTIFFS-APPELLEES' AND CROSS-APPELLANTS' REPLY BRIEF

HOPGOOD, CALIMAFDE, KALIL,
BLAUSTEIN & LIEBERMAN
*Attorneys for Plaintiffs-Appellees
and Cross-Appellants*
60 East 42nd Street
New York, New York 10017
(212) 986-2480

Of Counsel:

JOHN M. CALIMAFDE
EUGENE J. KALIL
MARVIN N. GORDON

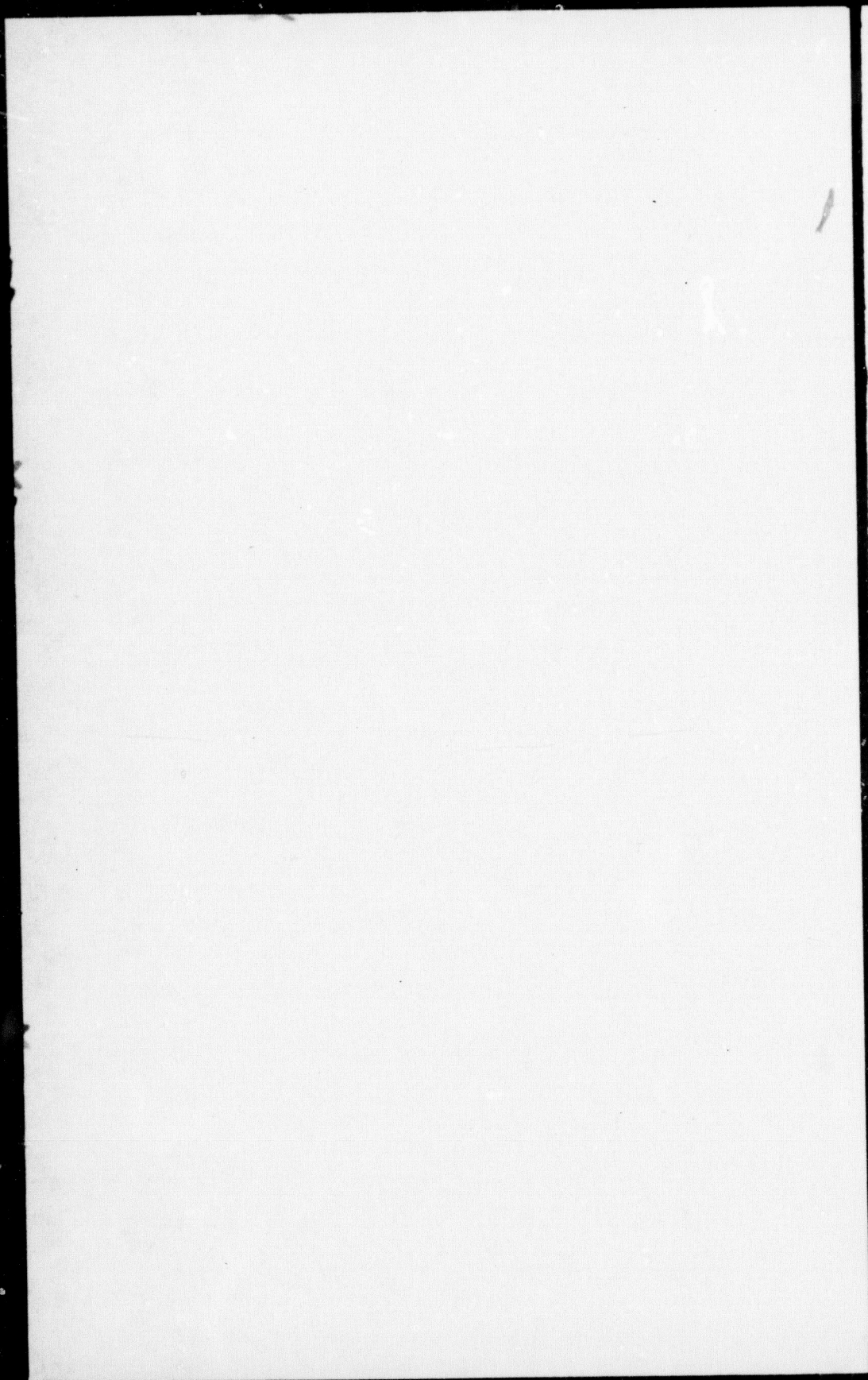


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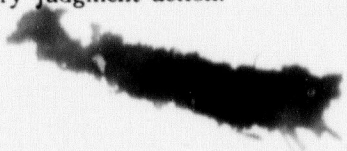
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PLAINTIFFS-APPELLEES' AND CROSS-APPELLANTS' REPLY BRIEF

Introduction

Defendant Metco's* main brief is directed both to the issues of validity and infringement of the patents. Since there can be no infringement of an invalid patent, *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694 (2 Cir. 1961), we turn first to the issue of validity.

* It is recalled defendant, Metco, is the patent owner in this declaratory judgment action.



The Prior Art Discloses All Elements of the Patented Material and Process.

The thrust of Metco's defendant's reply to our main brief on the issues of validity is merely to describe what is *not* shown in the prior art. Metco, however, overlooks the fact that the Supreme Court in *Graham v. John Deere*, 383 U.S. 1 (1966) calls for the claims to be compared against what is taught in the prior art; in this case, the prior art discloses each of the elements of the patented flame spray material.

That is, the prior art discloses a nickel-aluminum composite powder (Mackiw E-839), and the use in a flame-spraying material and process of additional heat generated by an exothermic reaction, including an intermetallic compound-forming reaction, to aid in bonding the sprayed material to the substrate (Gutzeit E-852, Haglund E-864 and Bradstreet E-847). The prior art discloses, as conceded by the patentee Dittrich (Tr. 1039), that it was conventional knowledge that aluminum and nickel reacted in an exothermic reaction to form an intermetallic compound (Grala E-858, Herz E-844). The prior art also discloses forming a powder particle in the form described in Example 31 of the patent and in Claim 14 of the '515 patent (Hensel E-832).

Defendant repeats its misleading statement that the Mackiw patent does not disclose a composite particle made of nickel and aluminum. All that need be done is to refer to the Mackiw patent (E-839), which states at Column 2, lines 16-46 that a composite metal powder can be formed of a nucleus of *aluminum* (line 16) and an outer core of

nickel (line 36). Thus, it is clear that Mackiw does disclose to one skilled in the art, as it did to Dittrich, a composite of nickel and aluminum of a size that is conventionally used in flame spraying (Tr. 1070-1071). And it was this same composite powder that Dittrich purchased from Sherritt Gordon, the owner of the Mackiw patent, and later disclosed and claimed as *his* invention in the patent; Example 1 in the patent is the Sherritt Gordon powder.

Moreover, while the court did discuss Mackiw as well as the Grala, Herz and Hensel patents, the relevance of these patents to the patents in suit was improperly restricted by the trial court as indicated by its statement (JA-60) that the art of flame spraying was "sufficiently distinct from the art of powder metallurgy, as to be considered the applicable art in this case." The finding is not supported by the record as the Examiner cited patents in the powder metallurgy art, and Dittrich learned of the Sherritt Gordon powder in a powder metallurgy trade journal. Thus, those skilled in the art, consulted powder metallurgy patents and literature for relevant flame spray metal powders.

When Dittrich learned of the Mackiw process for forming composites, he knew the process could be used to make a nickel-aluminum composite (Tr. 1108). He also knew from the literature the relative proportions of nickel and aluminum that were required to obtain a heat-generating inter-metallic reaction which would aid in bonding the sprayed material (Tr. 1080-1).

Dittrich merely selected aluminum and nickel from the list of metal pairs that Mackiw could form into a composite and used that material in the conventional spraying process

to achieve a result he expected. While this may be good engineering, it does not constitute patentable invention. As the Supreme Court pointed out in *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 335 (1945):

“Reading a list and selecting a known compound to meet known requirements is no more ingenious than selecting the last piece to put into the last opening in a jig-saw puzzle. It is not invention.”

The Gutzeit Patent and the Withdrawal of the Nickel-Phosphorous Example

Metco is also disingenuous in its explanation of its removal of the nickel-phosphorous examples from the earlier filed applications (PX 2-3). Metco alleges that this example was cancelled not because of the prior art Gutzeit patent which discloses the nickel-phosphorous composite, but because the nickel-phosphorous composite did not form “a self-bonding coating.” Metco, however, did not cancel the other thirty or so examples from the application, which according to Metco’s own definition of that term, do not form self-bonding coatings. Metco also retained in Table I of the patent over one hundred other pairs, most of which were never even tested (Tr. 1137).

The nickel-phosphorous pair was, however, sufficiently interesting to Dittrich in that it was the only other composite he obtained from Sherritt Gordon at the time he obtained and tested the aluminum-nickel composite (Tr. 1085). Dittrich flame sprayed the nickel-phosphorus composite and observed that the two components reacted in an exothermic reaction to form an intermetallic compound, and that the additional heat so generated aided in bonding

(Tr. 1089). The trial court stated (JA-51) that when the Gutzeit nickel-phosphorus material was flame sprayed, it formed a "coherent" and "adhering" nickel phosphide [an intermetallic compound] coating on a surface.

The Gutzeit nickel-phosphorus material is thus very closely related to the patented material in both structure and function as recognized by Metco when it attempted to cover both in the same application.

**The Self-Bonding Feature Is Not Claimed
and Does Not Distinguish the Patented
Material Over the Prior Art.**

Defendant also attempts to avoid the invalidating effect of the prior art by arguing that the patented flame-spray powder achieves what it calls "self-bonding," which simply means that the powder when sprayed adheres to the substrate. As pointed out in our main brief, none of the claims in issue refers to this alleged property of the patented materials. The claims merely call for the heat produced in the exothermic reaction to "aid in bonding" the sprayed material to the substrate. There is no dispute that the prior art does teach that additional heat generated by an exothermic reaction would "aid in bonding."

In *Koppers Co., Inc. v. S. S. Corrugated Paper Mach. Co., Inc.*, 517 F.2d 1182 (2 Cir. 1975), the patentee also urged upon this Court that his device produced a "synergistic" result, which, as here, was not recited in the claims.

In finding the patent invalid, this Court stated at 1188:

We cannot accept this argument. In the first place, this particular utility of the combination, though ad-

verted to in the specification, is not mentioned in the claim. . . ."

The Supreme Court in *Graham* required that the *claimed* subject matter be compared against the prior art. Since the self-bonding limitation is not in the claims, it is not part of the claimed invention and Metco cannot rely on this alleged feature to distinguish the patented subject matter over the prior art.

In addition, although Metco attempts to cast an aura of mystery about the nickel-aluminum powder, it overlooks Dittrich's trial testimony that it was common knowledge that bonding would be aided by heat such as that given off in the known exothermic reaction between nickel and aluminum (Tr. 1057, 1058). Moreover, although Metco now asserts this "unique" property for nickel and aluminum the patents in suit contain in Table I a list of about 140 additional metal pairs that exothermically react to form intermetallic compounds, each of which represents an example of the patented material.

The Patented Powders Meet None of the Secondary Criteria for Patentability.

Metco argues that the development of the nickel-aluminum powder satisfied a long-felt need in the industry for an additional "self-bonding" material. Metco's own record establishes the contrary. First, although Dittrich considered the use of a nickel-aluminum composite powder in 1955, it was not until four years later in 1959, that he first obtained and tested such powders. It is recalled that the Hensel patent (E-832) which discloses the binder technique

for cladding one metal on another was long in existence, and Dittrich did not have to await the Sherritt Gordon development of another form of composite. Even after Dittrich satisfactorily tested the powder he had bought from Sherritt Gordon, it was another five years before defendant began to sell the powder. It is difficult to imagine more telling evidence of a lack of demand or need for the patented powder. Moreover, there is no evidence whatever that others were attempting to develop a nickel-aluminum or other exothermic flame-spray powder during this period.

Equally misleading is defendant's claim to commercial success, which is based primarily on Metco's sales of its 450 powder, which the trial court found did *not* come within the scope of the patents.

In summary, the patents meet neither the primary nor secondary criteria for patentability and are, accordingly, invalid.

The Patents Are Not Infringed

The trial court found that the claims in issue were not infringed by any of plaintiff, Eutectic's, products since the evidence led to the finding that the accused powders were structurally and functionally outside the scope of the claims.

In its cross-appeal on the issue of infringement, Metco must establish that the trial court's finding of non-infringement is "clearly erroneous" under Rule 52(a); *Marvin Glass & Associates v. Sears, Roebuck & Co.*, 448 F.2d 60 (5 Cir. 1971).

In Graver Tank & Mfg. Co. v. Linde Air Products, 336 U.S. 271, 274-275 (1949), the Supreme Court said:

"To no type of case [patent] is this last clause [clearly erroneous rule] more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations. This trial occupied some three weeks * * * He wrote a careful and succinct opinion and made findings covering all the factual issues."

In this case, which lasted almost four weeks, three expert witnesses testified (two for Metco). The Court heard and actively examined the expert witnesses on complex questions of metallurgy and interpretation of x-ray diffraction patterns and graphical interpretation. After carefully weighing this testimony and the exhibits, the Court concluded that the claims were not infringed.

Of the claims in issue, Claim 4 of the '515 patent and Claims 1 and 4 of the '248 patent call for the flame-spray material to be in the form of a "composite", which as the Court noted, is defined by the patentees as a form in which the components "will exothermically react, forming inter-metallic compounds".

The other claim in issue, Claim 14 of the '515 patent, although not specifically reciting a composite, calls for the powder to be "characterized by the ability of generating heat" during flame spraying. The Trial Court stated if Claim 14 were read "literally" in the manner suggested by Metco, the claim "would clearly have been anticipated and invalid". The Court, in order to find the claim valid, interpreted the claim language in light of the patent specifica-

tion and statements made during the prosecution of the patent, and found that Claim 14, as well as the other claims in issue, required the heat to be generated by an exothermic reaction between the nickel and aluminum components of the powder during spraying through the *formation of the intermetallic compound*, nickel aluminide. The Trial Court found that the relative proportions of the metals in Eutectic's powders precluded any intermetallic reaction, and indeed none was found in the sprayed coating.

Metco's Contentions

Metco's cross-appeal is based on three premises, all of which are without substance in fact or in law.

Metco first argues that Claim 14 of the '515 patent is "literally" infringed, which should, according to Metco, foreclose any further discussion of infringement.

It is, however, well established that the language of a patent claim cannot be read in *vacuo* without regard to the patent specification, *United States v. Adams*, 383 U.S. 39, 48, 49 (1966).

In the leading case of *Westinghouse v. Boyden Power Brake Company*, 170 U.S. 537 (1898), the Supreme Court in considering the interpretation to be placed on claims, stated at 568:

"The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device, that the claims of the patent, literally construed, have ceased to represent the actual invention, he is as little subject to be adjudged an

infringer as one who has violated the letter of a statute has to be convicted when he has done nothing in conflict with its spirit and intent."

As noted by the Trial Court, the "essence" of the patented powder is that the proportions and composite arrangement of the aluminum and nickel are such that heat is produced by the exothermic reaction *between* the aluminum and nickel to form an intermetallic compound; i.e., the intermetallic reaction is the *sine qua non* of the claimed novelty, and is to be distinguished from the exothermic oxidation reaction of the aluminum which is in the prior art. According to Dittrich, if the metal pair does not react to form the intermetallic compound, the powder is not within the scope of the patent (Tr. 1171). Typical of the statements made during the prosecution of the '515 patent are (PX-5, pp. 70-71):

"the entire point of novelty is the formation of a flame spray composite with the specific selection of components."

which are capable of

"exothermically reacting by forming an intermetallic compound,"

and it is necessary

"that the *relative proportions* of the [components] are capable of reacting together to form the intermetallic compound. Proportions which will *not so react are*, of course, *not included* within the scope and terminology of the claims." (emphasis added)

Claim 14 thus may not be read literally for to do so would be completely to ignore the repeated statements to

the Examiner which persuaded the Examiner to grant the patent. Moreover, even as literally interpreted, the claims are invalid for the reasons stated in our main brief and in the earlier part of this brief.

The nature of the intermetallic reaction is not merely a "theory" or "reaction mechanism" as defendant contends; it is the essence of the coating resulting from the sprayed powder. If the reaction is intermetallic, the coating is nickel aluminide having certain specified properties. It is the properties of nickel aluminide which Dittrich desired from the outset in his coating. In contradistinction, Eutectic's powder does not produce a coating having any measurable amount of nickel aluminide; Eutectic's coating is substantially all nickel as the aluminum simply burns off while generating the additional heat.

In Eutectic's accused powder, the aluminum particles are contained in a resin binder about a nickel core. Those powders contain only 5% aluminum and 95% nickel. The trial record, including tests of the sprayed coating, establish conclusively that the coating of Eutectic's powders, because of the very low aluminum content, do *not* and *cannot* exothermically react with each other to form the intermetallic compound, nickel aluminide (Tr. 88, 92, 114, 217, 467, 668).

As the Trial Court found, when only 5% aluminium is used, the amount is insufficient for an intermetallic reaction to take place; the oxygen is simply burned off. This was demonstrated by defendant's own expert in his x-ray diffraction analysis of Eutectic's coating.

Mr. Osika, an outside consultant, performed *ante litem motem* tests on a coating formed of the accused powders

and found no intermetallic compound. All of the aluminum that remained in the coating was in the form of aluminum oxide, which is the result of the oxidation of the aluminum particles (PX-10, Tr. 682).

Mr. Patel, an employee of Eutectic and a skilled metallurgist, conducted several different tests to determine precisely the nature of the heat-generating mechanism in the accused powders. He obtained a chemical analysis and electron photomicrographs of the coatings, and he conducted extensive comparative tests in different atmospheres. All of his tests proved conclusively the absence of any intermetallic compound (nickel aluminide) in the coating (PX-15). In the accused powders the aluminum had been burned off by the oxygen (PX-15; Tr. 713, 727).

The results of these tests were supported in a study made by one of defendant's scientists, Mr. Longo, prior to the litigation. His tests showed (PX-43) that a coating formed by spraying the Metco 450 powder, which is equivalent to the Eutectic powder, did not contain the nickel aluminide intermetallic compound. In contrast, tests performed on Metco's 404 powder, which is made according to Example 1 of the patent, does form a coating containing nickel aluminide, because of the much higher aluminum content of 16% to 18%.

The additional heat generated in the accused powders by the oxidation of the aluminum particles is admittedly conventional and is shown, for example, in the Bradstreet and Haglund patents (Tr. 88, 375, 2030-31). It is this same heat-generating mechanism that is expressly excluded from the scope of the patented invention by statements made in

the specification of the '515 patent (Col. 6, lines 9-13); by statements made in the prosecution history;* and by Ditrach's testimony at trial (Tr. 1172).

The Use of a Process Similar to That Described in Example 31 Does Not Constitute Infringement.

Metco next contends that Eutectic's powders infringe the claims in issue because the powders are made by the binder *method* similar to that described in Example 31 of the patents. As observed by the Trial Court, however, this example calls for a powder containing 15% aluminum which, according to the nickel-aluminum phase diagram (PX-66), would produce the intermetallic compound as called for by the patent claims. The accused powders, however, contain no more than 5% aluminum, and theoretically and in practice are incapable of producing an intermetallic compound as required by the claims. As stated by the Court, "the evidence at trial convincingly established that the formation of an intermetallic compound as a heat generating mechanism could not be accomplished when only 5% by weight of aluminum powder is used, as in the case of the accused powders" (JA-83).

Metco's contention that Dr. Grant conceded that plaintiffs' products generate heat by the same [oxidation] "reaction mechanism" as that of the powder which is described in Example 31 is simply incorrect. Dr. Grant stated, "there's nothing spelled out there in Example 31

* See, for example, PX-4 at p. 69, where Metco stated:

"The heat generation by intermetallic compound formation is not to be mistaken or confused with the spraying of components which will exothermically react by *oxidation reaction or thermite-type reaction*." (Emphasis added.)

that tells me there's going to be a heat of oxidation". (Tr. 642).

Moreover, the binder process for producing the composite as described in Example 31 is an old process as shown in the Hensel patent. It is recalled, Metco abandoned an earlier application directed to this process which was rejected on Hensel.

That Eutectic's Powders Are Similar to Metco's 450 Powder and Are Called "Self-Bonding" Does Not Establish Infringement.

Metco's third argument on the issue of infringement is that Eutectic's accused powders are similar to the Metco 450 powder and are promoted by Eutectic as a "self-bonding" powder. The 450 powder is not described in any of the examples mentioned in the patents, and, moreover, does not have the requirement proportions of aluminum and nickel to produce an intermetallic compound. The 450 powder, therefore, does not come within the scope of the patent claims. Any similarity between the accused Eutectic powder and the non-patented Metco 450 powder is immaterial to the issue of infringement.

Infringement, of course, is determined by comparing the accused product with the patent claims and not with the patentee's commercial products; *Maclaren v. B-I-W Group, Inc.*, 535 F.2d 1367 (2 Cir. 1976). Nor can infringement be established merely by showing that Eutectic's accused powders are "self-bonding", as it is equally well established that a result or a function cannot be patented: *Westinghouse v. Boyden, supra*. As established in the

record, Eutectic's powders achieve improved bonding by following the prior art which teaches the oxidation of the aluminum powder, and not by following the patents in suit, which teach the intermetallic reaction of powders in composite form.

The Issue of "Heat of Solution" Raised by Defendant Is Misleading and Is Tantamount to a Concession of Non-Infringement.

As it did at trial, Metco, realizing that it could not prove the formation of nickel aluminide in the coating of the accused powders, argues that in the flame spraying, a slight amount of aluminum "melts" into the nickel to generate a "heat of solution". It then attempts to equate the "heat of solution" with the exothermic reaction of the intermetallic compound. This argument was so manifestly "reaching" and without merit that the trial court, in its careful discussion of all the evidence presented by both parties, did not even deem it worthy of comment in its decision.

First, the patents make no mention whatsoever of the heat of solution. Further, Dr. Grant testified that no meaningful amount of heat of solution is developed when the accused powders are sprayed because, first, the spacing between the nickel and aluminum occupied by the binder prevents the aluminum from melting into the nickel; and, second, the aluminum is substantially completely burned off in the short flight time from the gun to the surface (Tr. 685). The aluminum in "solution" referred to by Dr. Grant (Tr. 2200) has nothing whatsoever to do with the exothermic intermetallic reaction between aluminum and nickel as urged by Metco.

Moreover, Dittrich testified that the heat generated as contemplated by the patent was not the heat of solution but was the exothermic reaction resulting from the formation of the intermetallic compound (Tr. 1045).

Metco, by a complex hindsight argument, attempted to show that the patented "invention" was practiced if 3,000 calories per gram atom were generated by the "reaction" of the nickel and aluminum. The argument is a distortion of the statement in the patent. The patent, at Col. 3, lines 47-50, defines the term 'calories per gram atom as the heat generated in the formation of the *intermetallic compound*.' (emphasis added).

**Defendant Did Not Satisfy Its
Burden of Proving Infringement.**

Although it was Metco's burden to prove that Eutectic's powders infringed the patents, it conducted no analysis of the coatings to ascertain whether any intermetallic compound was present. Metco's case on infringement consisted primarily of a hurriedly performed and half-completed x-ray diffraction pattern made by Dr. Post during the trial proceeding (Tr. 1730).

The Trial Court carefully evaluated Dr. Post's tests and his testimony, and also weighed the testimony of Metco's other expert, Dr. Ingham, and found that the proofs were inadequate to establish infringement.

Eutectic's Independent Development of the Accused Powders

Metco, referring to the depositions of Eutectic's personnel, asserts what it terms "outright duplication" of its products by Eutectic. This argument fails in two respects. First, the record shows that Eutectic developed its product without reference to the patent or to any of Metco's products; and second, the Metco product that Eutectic used for comparison purposes *after* it had developed the accused Exotec powder, was the Metco 450 powder, which, as discussed above, is not within the scope of the patents.

Eutectic's employee, Yurasko, who developed the Exotec powder, began his work on developing this powder under instructions to make an agglomerated powder consisting of nickel and aluminum, (Yurasko Dep. 14, 16, Kapralos Dep. 115, 117, 126). There was no discussion at that time of either the Metco patents or the Metco powders.

When Yurasko began his work in March 1970, he employed well-known fabrication techniques (Yurasko Dep. 20, 25) and he initially selected proportions of nickel and aluminum that corresponded to his past experience which were different from the Metco powders and from the examples given in the patents (Yurasko Dep. 23, 24). At the time of his initial work on the accused powders, Yurasko did not even know the composition of the Metco powders (Yurasko Dep. 36, 41, 45, 51; Kapralos Dep. 129).

The final proportions of nickel and aluminum in the accused powders were selected several months later to conform to a customer specification (Yurasko Dep. 50) and

was made without reference to the patent, which does not disclose this composition, or to the Metco 450 powder. Had Eutectic wished to copy the Metco powder, it could have done so long before it selected the composition of its accused powders. Instead, it proceeded on an independent course that culminated in a composition that conformed to a customer's specification.

**The Trial Court Properly Awarded Costs to
Plaintiffs as the "Prevailing Party"**

Under Rule 54(b), costs are allowed "as of course" to the prevailing party. Here, plaintiffs brought the declaratory judgment action when charged with infringing the patents. Plaintiffs presented two defenses to this charge—that the patents were invalid and that they were not infringed. The court found that one of these defenses was sufficient to defend against the defendant's claim. Plaintiffs were thus "the prevailing party" and are entitled to their costs.

Respectfully submitted,

JOHN M. CALIMAFDE

Of Counsel:

EUGENE J. KALIL

MARVIN N. GORDON

HOPGOOD, CALIMAFDE, ^VALIL,

BLAUSTEIN & LIEBERMAN

60 East 42nd Street

New York, New York 10017

(212) 986-2480

Service of 2 copies of the
within Brief is hereby
admitted this 3rd day of
March 1977

Signed Richard Kravitz

Attorney for Defendant-Appellee
and Cross-Appellee